IN THE HIGH COURT OF SOUTH AFRICA

TRANSVAAL PROVINCIAL DIVISION

Case No: 32838/05

CHRISTIAN ROBERTS	First Applicant
NEVILLE ARTHUR WHITEBOOI	Second Applicant
ADAM CASLING	Third Applicant
JOSEPH VISAGIE	Fourth Applicant

And

MINISTER OF SOCIAL DEVELOPMENT	First Respondent
DIRECTOR-GENERAL SOCIAL DEVELOPMENT	Second Respondent
MINISTER OF FINANCE	Third Respondent
THE MEC FOR SOCIAL DEVELOPMENT, EASTERN CAPE	Fourth Respondent
CENTRE FOR APPLIED LEGAL STUDIES	First Amicus Curiae
COMMUNITY LAW CENTRE	Second Amicus Curiae
SOUTH AFRICAN HUMAN RIGHTS COMMISSION	Third Amicus Curiae

HEADS OF ARGUMENT OF THE FIRST AND SECOND AMICI CURIAE

INTRODUCTION

1. The first *amicus curiae* is the Centre for Applied Legal Studies ("CALS"), a human rights institute based at the University of the Witwatersrand. CALS was established in 1978. It conducts research and engages in advocacy, litigation and training relating to the promotion and protection of human rights in South Africa.

2. The second *amicus curiae* is the Community Law Centre ("CLC"), a human rights organization based at the University of the Western Cape. CLC was established in 1990. It is committed to protecting and promoting human rights, particularly those vulnerable groups such as children, women and people who are living in poverty. It also conducts research and engages in litigation towards this end.

3. This case concerns a challenge to the constitutionality of the provisions of Section 10 of the Social Assistance Act 13 of 2004 ("the Act") and Regulation 2(2) of the regulations made in terms of Section 32 of the Act, published in the Government Gazette No. 27316 of 2 February 2005 ("the Regulation"). The matter raises important constitutional issues concerning the rights of both women and men between the ages of 60 and 64 who

receive, or should be entitled to receive, old age pension grants in terms of the Act.

4. In view of their interest, expertise and experience, the *amici* have been admitted to the proceedings. They wish to assist the court by providing submissions that offer a distinct perspective on the issues raised in this application.

5. In these heads of argument :

5.1. First, we consider in some detail the purpose served by the old age pension and the respondents' justification for the age-based gender discrimination in its administration.

5.2. We then consider the fundamental right to social security protected by Section 27(1)(c) of the Constitution and the corresponding duties it imposes on the State. We argue that the failure by the State to extend old age pension grants to means eligible men in the 60 – 64 year old age group violates their fundamental right to social security and constitutes a breach of the State's positive and negative obligations in respect of this right.

5.3. We address the equality challenge to the Act and Regulation. We show that the Act and Regulation are inconsistent with section 9(3) of the Constitution because they discriminate unfairly on grounds of age and sex. In this regard we emphasize how the exclusionary impact of the Act and Regulation operates particularly harshly on the victim group of 60 – 64 year old poor men who are drawn from a class which is subject to discrimination on intersectional grounds of age, sex, race and social origin and poverty or social origin.

5.4. We show that the "policy" of the respondents which seeks to justify this discrimination against 60 – 64 year old poor men is insufficiently designed to qualify for protection under Section 9(2) of the Constitution.

5.5. We finally address the question of remedy and submit that appropriate relief in the present case demands, at the least, an order which will immediately extend the old age pension grant to men within the age band of 60 – 64.

THE OLD AGE PENSION AND THE RESPONDENTS' JUSTIFICATION FOR AGE-BASED GENDER DISCRIMINATION

6. The old age pension is a monthly grant of R820 which is available to men over the age of 65 and women over the age of 60 if they are means eligible. In order to qualify for means eligibility, unmarried persons must have assets not exceeding R295 000 and an annual income of less than R20 232. Married persons must, together with their spouses, have combined assets not exceeding R590 400 and a combined annual income of less than R37 512.[1] In April 2006 more than 95% of the eligible population received old age pensions. This amounted to 76% of the total male population over 65 and female population over 60.[2]

7. The Taylor Committee Report, upon which the respondents rely, stated the following in respect of the old-age pension:

> *"[It is] the largest current social security transfer in the country, and, for those elderly persons who receive it, the grant plays a pivotal poverty alleviation role for the entire household."*[3]

It is common cause that the grant has a twofold effect in addressing poverty. It reduces poverty and vulnerability among older persons as individuals. It also has effects upon aggregate poverty because of the link between poverty and households containing older people.[4]

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[1] Pakade vol 1 p 71 para 28.

[2] Pakade vol 1 p 70 para 27.

[3] Taylor Committee Report quoted in Pakade vol 1 p 72 para 31.

[4] Pakade vol 1 p 73 para 33 and pp 74-5 para 35.

8. The non-contributory means tested old age pension was introduced in South Africa in 1928 for white and coloured elderly men and women.[5] The eligibility age for the pension was originally 65 for both men and women. In 1937 the eligibility age for women dropped to 60; but for men it remained at 65.[6] This took place in the context of an improvement in employment opportunities in sheltered state employment for poor white and coloured men in the age group 60 – 64.[7] It also took place in an era in which women were not expected to engage in paid employment and society expected women to be married and financially supported by older husbands.

9. Since 1937 the old age pension has been extended to all race groups in South Africa but there has been no change in the 60 and 65 eligibility ages for women and men respectively. [8]

10. The respondents present the current age and gender differentiation as the product of a deliberate policy of the Department of Social Development which is aimed at the advancement of gender equality and suggest that this policy will be reviewed periodically to assess its continued validity and efficacy.[9] This assertion raises two obvious questions:

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[5] Pakade vol 1 p 69 para 24. Section 1(a) of the Old Age Pension Act 22 of 1928.

[6] Pakade vol 1 p 69 para 24. Section 1(2) of the Old Age Pension Amendment Act 34 of 1937.

[7] Seekings vol 4 p 1307 para 11.

[8] Pakade vol 1 p 69 paras 24 - 25.

[9] Pakade vol 1 p 68 para 23.

10.1. First, the “policy” enunciated by the respondents is not evidenced by any policy documents from the period since April 1994. The absence of any such policy documents suggests the “policy” amounted to a passive acceptance and rationalization of the discriminatory scheme designed in 1938 for very different reasons and inherited by the democratic government in 1994.

10.2. Second, the “policy” is not tailored to the purpose which it is ostensibly aimed at achieving. If the respondents want to promote the position of women in society, there is no rational basis for singling out poor women in the five year age band from 60 to 64 to advantage over poor men of comparable age, but reverting to an approach of formal equality as soon as men and women reach the age of 65. Instead, as Gelb points out, if the promotion of the position of women were to be rationally pursued in a manner consistent with the State’s obligations under section 27 of the Constitution, one would expect the pension eligible age of men and women to be the same, but women to receive a larger pension than men.[10]

11. There is a more fundamental flaw running through this “policy”. It is that it is based on generalizations about the relative positions of women and men in

[10] Gelb vol 4 pp 1381-2 para 19.

society and does not move down to the level of comparing the position of means eligible 60 - 64 year old women with that of means eligible 60 – 64 year old men. Having regard to the purpose of social assistance and the position of poor men in the age group 60 – 64, the evidence and argument presented by the respondents simply does not justify an absolute disqualification of 60 - 64 year old men from access to the old age pension.

12. Seekings and Gelb highlight two fundamental problems with the evidence marshalled by the respondents in support of their case that 60 – 64 year old women are much more deserving recipients of the old age pension than their male counterparts:

12.1. First, there is nothing to suggest that the differences between 60 – 64 year old men and women in the figures assembled by the respondents are statistically significant. As Gelb explains:

> *"Without proper statistical testing of the data, it cannot be concluded that the differences between the 'scores' of women and men are **statistically significant**. In other words, in the absence of these tests, it must be assumed that objectively, there are **no differences** between men and women with respect to the issue being investigated… The argument in the affidavit makes no use anywhere of such tests, such as the t-test to check whether two samples (say, of men and of women) have significantly different characteristics and are therefore independent of each other."*[11]

[11] Gelb Vol 4 p 1374, paras 12 – 18 at para 16.

12.2. Second, the figures are misleading and inappropriate because they compare the position of men and women generally and do not compare the position of *means eligible* men and *means eligible* women which is the only relevant comparison for the purposes of formulating the age and gender based discriminatory pension policy. Thus Seekings points out that the respondents' use of "African" as a proxy for "means eligible" is inappropriate because the 60 – 64 year old male African population has a much higher number of members (20%) who are too wealthy to qualify for an old age pension than the 60 – 64 year old female African population (3%). This means that "poverty index" comparisons between the overall 60 – 64 year old male and female African populations will show much greater discrepancies between men and women than the corresponding comparisons between the 60 – 64 year old male and female means eligible populations.[12]

13. Seekings has used the General Household Surveys to run the appropriate comparisons between means eligible African men and women in the 60 – 64 year old age band. His comparisons show that the "poverty index" differences between the two groups are, in fact, negligible. Thus

[12] Seekings vol 4 p 1315 para 26(b) and p 1318 para 30 – p 1320 para 32.

13.1. In respect of education,[13] the comparative figures are

13.1.1. no schooling: 39% of African women compared to 37% of means eligible African men

13.1.2. no secondary schooling: 54% of African women and 54% of means eligible African men,

13.2. In respect of employment, [14] the comparative figures are

13.2.1. not working: 88% of African women and 82% of means eligible African men

13.2.2. have not worked for more than 3 years: 80% of African women and 73% of means eligible African men,

13.3. In respect of household assets,[15] the comparative figures between households with at least one African woman in the 60 – 64 year old age band, and households with at least one means eligible African man in the age band but no means ineligible African men in that age band are the following:

[13] Seekings vol 4 p 1321 Table 1

[14] Seekings vol 4 p 1324 Table 2

[15] Seekings vol 4 p 1330 Table 4

13.3.1. radios: 84% of the African women's households but only 77% of the means ineligible African men's,

13.3.2. televisions: 68% of the African women's households but only 54% of the means ineligible African men's,

13.3.3. video recorders: 30% of the African women's households but only 13% of the means ineligible African men's,

13.3.4. landline telephones: 35% of the African women's households but only 11% of the means ineligible African men's, and

13.3.5. washing machines: 32% of the African women's households but only 9% of the means ineligible African men's.

14. As Seekings concludes, the statistics produced by the respondents simply do not justify age-based gender discrimination in access to the old age pension :

> *"The typical 60 year old poor woman has indeed been disadvantaged by poor formal education, marginalization in the*

labour market, and no doubt also subordination in the home. But the typical 60 year old poor man has been similarly disadvantaged by poor formal education, his employment opportunities were limited to low wage and dangerous unskilled work on the mines and farms, and he has been unemployed for a large portion of his adult life. Most elderly men share with women a set of disadvantages that prevented them saving for their own retirement. The means test would serve to exclude the minority of men who have been relatively advantaged. There is no need or justification for discriminating against all men."[16]

THE FUNDAMENTAL RIGHT TO SOCIAL SECURITY

The Interpretation and Enforcement of the Fundamental Right to Social Security

15. Section 27 of the Constitution states that

> *"(1) Everyone has the right to have access to-*
>
> *…*
>
> *(c) social security, including, **if they are unable to support themselves and their dependents**, appropriate social assistance.*
>
> *(2) The state must take **reasonable** legislative and other measures, within its available resources, to achieve the progressive realisation of each of these rights."* (emphasis added)

16. Like all socio economic rights in Chapter 2 of the Constitution, the fundamental right to social security is justiciable in two ways.

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[16] Seekings, Vol 4, p 1330, para 47

16.1. First, it is negatively enforceable. Thus any action by the State which impairs the fundamental right to social security is unconstitutional unless it can be justified under the limitations clause.[17]

16.2. Second, it imposes a positive obligation on the State to take reasonable steps within its resources to achieve the progressive realization of the fundamental right. [18]

17. The criterion of "reasonableness" determines the ambit of the positive duty imposed upon the State by section 27. In considering this criterion, the Constitutional Court has laid down certain principles:

17.1. State measures must be comprehensive, coordinated, coherent, flexible and balanced, reasonably formulated and implemented, and inclusive of those in need.[19]

17.2. State measures cannot leave out of account the degree and extent of the denial of the right they endeavour to realize:

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[17] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para 37. Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) at para 46.

[18] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para 38.

[19] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) paras 40 – 44. Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) at para 68.

> *"Those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril, must not be ignored by the measures aimed at achieving realisation of the right."* [20]

17.3. The impact of existing State measures on the fundamental rights to dignity, life and equality of those who these measures exclude is relevant to their reasonableness.[21]

17.4. While the State may legitimately raise resource constraints to justify its failure to provide the benefits promised by socio economic rights to everyone who is in need, the basis upon which it chooses to withhold benefits to the needy cannot be one which amounts to unfair discrimination. [22]

18. The Constitutional Court has applied these general principles of the enforcement of socio-economic rights specifically to the fundamental right to social security, in the *Khosa* case. Like the present case, *Khosa* concerned a legislative scheme which, on a discriminatory basis, excluded certain

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[20] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para 44. Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) at para 68.

[21] Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC) at para 44.

[22] Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC) at para 45.

persons (in that case, non-citizens) from access to social assistance. In *Khosa* the Constitutional Court stated the following:

> *"The right of access to social security, including social assistance, for those unable to support themselves and their dependants is entrenched because as a society we value human beings and want to ensure that people are afforded their basic needs. A society must seek to ensure that the basic necessities of life are accessible to all if it is to be a society in which human dignity, freedom and equality are foundational."*
>
> *"In dealing with the issue of reasonableness, context is all-important. We are concerned here with the right to social security and the exclusion from the scheme of permanent residents who, but for their lack of citizenship, would qualify for the benefits provided under the scheme. In considering whether that exclusion is reasonable, it is relevant to have regard to the purpose served by social security, the impact of the exclusion on permanent residents and the relevance of the citizenship requirement to that purpose."*[23]

The Unconstitutionality of the Exclusion of 60 – 64 year old men: A Breach of the Positive Obligation in Section 27(2)

19. The respondents describe the purpose of the old age pension in the following terms:

> *"The immediate objective for the old age pension is to alleviate hardship among old people. Vulnerability rises with age for numerous reasons : a decline in job opportunities (especially informal employment); reduced pay for those in employment; asset poverty or the effects thereof; increased vulnerability to health conditions; limited mobility; discrimination and access to credit and financial markets; restrictions in access to basic*

[23] Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC) at paras 52 and 49.

> *services, such as educational health; and changes in household composition and status. These factors are exacerbated for older people who have been excluded, for example, by the operation of apartheid and patriarchal systems, from obtaining for themselves the social benefits that prepare one for retirement and protect against poverty. These justify focusing social protection programmes on the elderly, not just in order to compensate for declining opportunities, but also to facilitate older people's efforts to cope with their increased vulnerability. The vulnerability of older people also influences their status within their households and communities, and pension provision has an impact on this. At the individual level, the pension contributes to the economic independence of some older persons; it can ensure that older persons are perceived as valuable family members; and, measured by a range of deprivation indicators, older persons with a pension have a lower incidence of deprivation compared to older persons without a pension."* [24]

20. The old age pension is a highly effective form of social assistance. At R820 per month it is currently equal to slightly more than twice the median per capita income of black South Africans.[25] In 2001 it reduced the poverty gap for pensioners by 94%.[26]

21. There is no acceptable justification for the exclusion of means eligible men in the 60 – 64 age band from this benefit.

22. An old age pension is designed to provide for people who, by virtue of their age and financial circumstances, are unable to provide for themselves. There are two basic means by which people can provide for themselves: income from employment or other economic activity, and savings. The vast

[24] Pakade vol 1 p 73 para 34.

[25] Pakade vol 1 p 70 para 26.

[26] Pakade vol 1 p 123 para 93.

majority of the means eligible male population in the age band 60 – 64 years has no prospect of providing for themselves in either of these ways.

22.1. 82% of this male population is unemployed and 73% of it has been unemployed for more than three years.[27]

22.2. The nature of the employment historically available to these men was such that they had no realistic prospect of accumulating enough savings to provide for themselves in old age.[28] The respondents can hardly contend that these men fall outside the category that they, themselves, describe of *"older people who have been excluded, … by the operation of apartheid … from obtaining for themselves the social benefits that prepare one for retirement and protect against poverty".*[29]

22.3. Thus Gelb points out that at least 29% of the total male population in the age band has no access to income and is entirely dependent on others,[30] and 59% of the total African male population in the age band live in poverty in households with a monthly expenditure of less than R800.[31]

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[27] Seekings vol 4 p 1324 Table 2

[28] Seekings vol 4 p 1323 paras 35 – 36, p 1331 para 47 and pp 1333-4 paras 52 - 53.

[29] Pakade vol 1 p 73 para 34.

[30] Gelb vol 4 p 1383 para 22.

[31] Gelb vol 4 p 1384 para 25.

22.4. Indeed, if we remove the 20% of the African male population in the age band which is means ineligible,[32] the 59% of the total African male population becomes 74% (59%/80%) of the means eligible African male population in the age band.

22.5. So 74% of the excluded group of African men is living in poverty in households where monthly expenditure is less than R800.

23. The means test applied by the respondents has the result that within the designated age bands, men and women earning less than R20 232 per annum (R1686 per month) are eligible for the old age pension. Thus within the designated age bands, persons earning more than four times the median per capita income of black South Africans qualify for the pension.

24. When this is the standard applied for determining means based eligibility for social assistance, there can be no justification for excluding an age band of men where approximately three quarters of the means eligible members of the group are unemployed and unlikely to have any prospect of finding employment in the future, have no savings to speak of and are living in poverty where monthly collective household income is less than R800 (ie less than half the individual threshold for means eligibility).

[32] Seekings vol 4 p 1315 para 26(b) and p 1318 para 30 – p 1320 para 32.

25. In the section which follows, we show that the age-based gender discrimination in the old age pension violates section 9(3) of the Constitution. This interrelationship with the equality case reinforces the applicants' claim under section 27. Thus in finding that the State's refusal to provide social assistance to permanent residents under the Social Assistance Act amounted to a violation of section 27, Mokgoro J said:

> *"Equality is also a foundational value of the Constitution and informs constitutional adjudication in the same way as life and dignity do. Equality in respect of access to socio-economic rights is implicit in the reference to "everyone" being entitled to have access to such rights in section 27. Those who are unable to survive without social assistance are equally desperate and equally in need of such assistance.*
> *…*
> *It is also important to realise that even where the State may be able to justify not paying benefits to everyone who is entitled to those benefits under section 27 on the grounds that to do so would be unaffordable, the criteria upon which they choose to limit the payment of those benefits (in this case citizenship) must be consistent with the Bill of Rights as a whole. Thus if the means chosen by the Legislature to give effect to the State's positive obligation under section 27 unreasonably limits other constitutional rights [such as equality], that too must be taken into account*
> *…*
> *Sharing responsibility for the problems and consequences of poverty equally as a community represents the extent to which wealthier members of the community view the minimal well-being of the poor as connected with their personal well-being and the well-being of the community as a whole. In other words, decisions about the allocation of public funds represent the extent to which poor people are treated as equal members of society*."[33]

[33] Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC) at paras 42, 45 and 74.

26. The equality argument is developed in some detail in the following section. For present purposes we point out that the Act and the Regulation violate not only the non-discriminatory principle under sections 27 and 9, but also two additional principles of reasonableness analysis under section 27 of the Constitution:

26.1. They ignore people "*whose needs are the most urgent and whose ability to enjoy all rights [are] most in peril*": [34] The pension reduces the poverty gap for pensioners by 94%. Yet, the pension system of the respondents excludes a group, at least 74% of whose members are living in poverty because they are living in households where monthly expenditure is less than R800. The respondents' system accordingly ignores a most vulnerable group. Moreover, it does so at the same time as it is able to accommodate people whose individual earnings are more than double the monthly expenditure of the entire households from which the members of this vulnerable group are drawn.

26.2. The Act and Regulation condemns this 74% of the excluded group to abject poverty. To make most means eligible men in the 60 – 64 age band live in a household which spends less than R800 per

[34] Government of the Republic of South Africa and Others v Grootboom and Others 2001 (1) SA 46 (CC) at para 44. Minister of Health v Treatment Action Campaign (No 2) 2002 (5) SA 721 (CC) at para 68.

month, in circumstances where they are dependent on others for income is profoundly subversive of their dignity.

27. The State cannot even point to the existence of any progressive plan to address the needs of this vulnerable group of means eligible 60 – 64 year old men. There is nothing on the papers to suggest that their present exclusion from access to social assistance will be temporary. Instead, there is every reason to believe that this vulnerable group will continue to be excluded unless the Courts order the State to remedy their existing unconstitutional plight.

28. Nor can the State raise resource constraints to avoid the unconstitutionality of its existing old age pension arrangements. First, it is precluded from allocating available resources in a manner which is unfairly discriminatory.[35] Even if there were insufficient resources to accommodate an incorporation of the excluded group into the existing pension arrangements, the current scheme would remain unreasonable and unconstitutional and the State would be obliged to redesign a scheme which did not unreasonably impose on 60 – 64 year old men, the burden of its financial constraints.

[35] Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC) at para 45.

29. However, this issue does not arise in the present case because the State does have available resources to accommodate 60 – 64 year old men within the pension eligible population.

30. The respondents calculate the cost of incorporating 60 – 64 year old men into the system at R3.3 billion per annum.[36] However, Gelb[37] shows that there is a central fallacy in the costing calculations put forward by the respondents:

30.1. the respondents justify the existing scheme on the basis that within the 60 – 64 year old age band women are more disadvantaged than men,

30.2. only 54% of the women in the 60 – 64 year old age band currently receive old age pensions,[38]

30.3. yet the respondents have calculated the cost of including 60 – 64 year old men into the old age pension on the basis that **64%** of the male population in that age band will receive pensions.[39]

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[36] Pakade vol 1 p 153 para 135.

[37] Vol 4 p 1386 para 29.

[38] Gelb vol 4 p 1386 para 29 read with Pakade vol 1 p 151 para 132 and Table 1 p 79.

[39] Gelb vol 4 p 1386 para 28 read with Pakade vol 1 p 152 para 134 and Table 1 p 79.

31. The costing assumptions of the respondents must be incorrect because it would be inconceivable, on their argument, that a greater percentage of men in the 60 – 64 year old age band would qualify for pensions than the percentage of women who do so. Indeed, if these assumptions were correct, there would be no conceivable basis for the "policy" which the respondents advance to defend the age-based gender discrimination.

32. If one assumes that the percentage of men in the age band who will qualify for pensions will not be higher than the 54% of women in the age band who currently receive pensions, the total cost of incorporation of the men into the scheme drops from R3.3 billion to R2.764 billion.[40] We point out in this respect that the true figure will probably be significantly lower than R2.764 billion because the true percentage of 60 – 64 year old men who are means eligible will probably be significantly lower than the known figure of 54% for women. Although there appear to be no material differences between the levels of poverty within the means eligible male and female populations, the statistics suggest that the proportion of the male population that is means eligible is significantly lower than the comparable proportion of the female population.[41]

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[40] Gelb vol 4 p 1387 para 29.

[41] As we have seen in paragraph 12.2 above, Seekings shows that 20% of African men in the 60 – 64 year old age band earn an income which places them outside the means test, as opposed to only 3% of African women in the age band.

33. Pakade discloses that the Department underspent by R1.6 billion in the 2005/6 financial year.[42] Although this was the product of successful efforts to remove fraud from the social assistance grants system it remains significant for the purposes of assessing available resources because, having regard to the separation of powers between legislature and executive, available resources are properly determined by Parliament, not by the Department. Thus, having regard to the amount Parliament was willing to budget for social assistance in 2005/6, we can immediately deduct R1.6 billion from the projected cost of R2.764 billion, leaving a shortfall of only R1.164 billion which amounts to only 1.9% of the total grants budget of R61.3 billion for the 2006/7 financial year.[43]

34. By October 2006 revenue was expected to overrun estimates by 4.5% for the 2006/7 financial year. Over the 7 financial years from 1999 to 2006 revenue overruns averaged 4.9%.[44] In such circumstances, it is fanciful to suggest that a 1.9% increase on the grants budget of the Department of Social Development is not within the available resources of the State.

35. Gelb shows, moreover, that even on the 64% male population costing assumption of the respondents, the incorporation of men in the 60 – 64 year old age band

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[42] Pakade vol 1 p 155 para 139.2.

[43] The figure of R61.3 billion is taken from Pakade's Table 23 at vol 1 p 164.

[44] Gelb vol 4 p 1388 para 32.

35.1. would have no material impact on the budget deficit,[45]

35.2. would have no material impact on the capital markets,[46] and

35.3. would not lead to problems in the future because the projected increase of the male population in the relevant age band is only 1.95% so real economic growth of 2% would be sufficient to accommodate the expansion of this population.[47]

36. It follows that the extension of pensions to means eligible men in the 60 – 64 year old age band is comfortably within the available resources of the State and its exclusion of this group is a violation of the State's positive obligation under section 27(2) of the Constitution.

The Unconstitutionality of the Exclusion of 60 – 64 year old men: A Breach of the Negative Obligation in Section 27(1)(c)

37. As has been set out above, an old age pension is designed to provide for people who, by virtue of their age and financial circumstances, are unable to provide for themselves. The original logic of retaining 65 as the age for

[45] Gelb vol 4 p 1390 para 33.

[46] Gelb vol 4 p 1391 paras 34-35.

[47] Gelb vol 4 p 1392 para 36.

pension eligibility for men when women became eligible at 60 was that up to the age of 65 men (or at least white and coloured men) could be expected to find employment to support themselves.[48]

38. That assumption no longer bears any relationship to reality. As we have seen above, 82% of the African male means eligible population is unemployed and 73% has been unemployed for more than three years.[49]

39. The 65 year old barrier to male pension benefits was kept in place on the basis that it was only at 65 that able bodied men were no longer able to find work. The old age pension system structured around the 65 year old entry point for men was accordingly a system designed to provide for men at the point at which they faced inevitable unemployment. To maintain the 65 year old age barrier in place when means eligible men in the 60 – 64 age band are unemployed and have no realistic prospect of finding work is, in substance, to cut back the social assistance offered by the State, and so, by omission, to limit the fundamental right to social assistance in its negative dimension.

40. It follows that quite apart from the State's failure to comply with its positive obligations under section 27(2), the exclusion of means eligible men in the

[48] Seekings vol 4 p 1307 para 11.

[49] Seekings vol 4 p 1324 Table 2

60 – 64 year old age band from old age pensions is also a violation of the State's negative obligation under section 27(1)(c) of the Constitution.

THE ACT AND REGULATIONS VIOLATE SECTION 9(3)

The Place of Equality in the Constitution

41. Equality is central to the Constitution as a value and a right. Equality has a particularly important place in our Constitution because of South Africa's history of racial inequality and division. Equality is listed as a founding value in s 1 of the Constitution, as is non-racialism and non-sexism. Equality, alongside human dignity and freedom is again highlighted in the introductory section to the Bill of Rights (s 7) and as a guiding value in any consideration of a limitation of rights in the Bill of Rights (in s 36). In addition to its role as an underlying value, it is also an enforceable right (s 9). The Constitutional Court has repeatedly stressed the centrality of equality in our constitutional schema. In the *Hugo* case, Kriegler J said the following:

> *"The South African Constitution is primarily and emphatically an egalitarian constitution. The supreme laws of comparable constitutional states may underscore other principles and rights. But in the light of our own particular history, and our vision for the future, a constitution was written with equality at its centre. Equality is our Constitution's focus and organising principle".*[50]

[50] The President of the RSA v Hugo 1997 (4) SA 1 (CC) at para 74

More recently, in the *Van Heerden* judgment Moseneke J stated:

> *"The achievement of equality goes to the bedrock of our constitutional architecture. The Constitution commands us to strive for a society built on the democratic values of human dignity, the achievement of equality, the advancement of human rights and freedom. Thus the achievement of equality is not only a guaranteed and justiciable right in our Bill of Rights but also a core and foundational value; a standard which must inform all law and against which all law must be tested for constitutional consonance."*[51]

42. The particular type of equality found in our Constitution has been described by the Constitutional Court as 'substantive equality'. This is explained in part, by contrasting it with a more 'formal' notion of equality. Formal equality sees inequality as an irrational aberration from an otherwise equal social order. It presumes that everyone starts from the same point and that by removing arbitrary differences, equality will result. This approach has been criticized for failing to acknowledge the actual social and economic disadvantages that certain groups experience and how these disadvantages may be reinforced through laws, policies and practices that seem to be neutral but in fact maintain other groups' positions of privilege. Affirmative action and other forms of remedial equality cannot be accommodated in a formal equality approach. Substantive equality, by contrast, recognizes that inequality is embedded in social and legal differentiation, often along the lines of race, gender and class but also other

[51] Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)

forms of systemic under-privilege. Substantive equality accordingly pays attention to history, to the context in which a particular claimant is located, to the impact of the alleged equality violation on the complainant, to harm rather than difference, to disadvantage, as well as to the purpose of equality as understood within the South African Constitution as a whole.[52]

The Fundamental Right to Equality

43. The equality right contains three related components: It provides for equal protection of the law (s 9(1)); positive measures to promote equality (s 9(2)); and, a prohibition against unfair discrimination (s 9(3), (4) and (5)). Each of these components is tested according to different standards (rationality, reasonableness and fairness respectively) as developed by the Constitutional Court in its jurisprudence on the right. Sachs J has however stressed that the right must be understood as a whole rather than formulaically to achieve equality based on an approach that is "cumulative, interrelated and indivisible".[53]

44. An equality enquiry will generally begin with an examination of whether a person or groups' entitlement to equal protection or benefit of the law has

[52] Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) at paras 26 – 27. C Albertyn and B Goldblatt (2007) 'Equality' in S Woolman et al (eds) Constitutional Law of South Africa 2nd Edition, Chapter 35, 5 – 7. National Coalition for Gay and Lesbian Equality v Minister of Justice 1999 (1) SA 6 (CC) at paras 60/1

[53] Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) at para 135

been violated. A classification that is irrational or arbitrary will not succeed. The Court has recognized that the business of government involves many situations where distinctions must be made between different groups. 'Mere differentiation' is permissible (as opposed to discrimination) where it is rational.[54]

45. In its approach to s 9(1) the court has used a weak rationality test that is extremely deferential to the legislature and almost all cases have passed through this first hurdle of the equality right without difficulty. [55] Following this first enquiry, it remains open to a complainant to say that the measure, despite its rationality, is unfairly discriminatory (in terms of s 9(3)). The state can respond to such a claim by raising the defence entailed in s 9(2) ie: that the measure was designed to promote equality by protecting or advancing an unfairly disadvantaged group. In the event that such a defence fails, the state will then have to show that the measure does not constitute unfair discrimination (in terms of s 9(3)). If complainant succeeds in showing a limitation of section 9(3), the state still has recourse to s36 of the Constitution to justify the limitation of the equality right in that case.[56]

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[54] Prinsloo v Van der Linde 1997 (3) SA 1012 (CC)

[55] C Albertyn and B Goldblatt (2007) 'Equality' in S Woolman et al (eds) Constitutional Law of South Africa 2nd Edition, Chapter 35, 21-2.

[56] Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) at paras 31-6.

46. Having broadly set out the Courts' approach to section 9 as a whole, the equality right will now be considered in relation to the facts of the present case. In view of the fact that the Act and the Regulation both differentiate on the listed grounds of age, sex and gender we will focus this section of the heads of argument on sections 9(3) and 9(2).

Discrimination

47. Section 9(3), (4) and (5) of the Constitution read as follows:

> *"(3)The state may not unfairly discriminate directly or indirectly against anyone on one or more grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief, culture, language and birth.*
>
> *(4)No person may unfairly discriminate directly or indirectly against anyone on one or more grounds in terms of subsection (3). National legislation must be enacted to prevent or prohibit unfair discrimination.*
>
> *(5) Discrimination on one or more of the grounds listed in subsection (3) is unfair unless it is established that the discrimination is fair."*

48. In *Harksen v Lane*, the Constitutional Court set out the test to be followed in cases where unfair discrimination is alleged. Goldstone J summarized the test as follows:

> *"(i) Does the differentiation amount to "discrimination"? If it is on a specified ground, then discrimination will have been established. If it is not on a specified ground, then whether or*

not there is discrimination will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner.

(ii) If the differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground, then unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If, at the end of this stage of the enquiry, the differentiation is found not to be unfair, then there will be no violation of section 9(3).

If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitations clause (s 36)."[57]

49. If we pare this down even further, the test asks:

49.1. Does the differentiation amount to discrimination?

49.2. If so, was it unfair?

49.3. If so, can it be justified in terms of the limitations clause (s36)?

50. Section 9(3) contains a long list of grounds of unfair discrimination. In the present case the exclusion of men from the old age pension between the ages of 60 and 64 is discrimination on the listed grounds of age, sex and gender.

[57] Harksen v Lane NO and Others 1998 (1) SA 300 (CC) at para 53.

51. There is no doubt that gender discrimination is a deeply systemic feature of our society and that Black women in particular, have suffered greatly from centuries of exclusion and marginalization.[58] As a general rule, men in the age band 60 – 64 have been better off than women in this age band if one examines the history and context of their circumstances. However, as we have seen above with reference to the expert evidence of Seekings and Gelb, means eligible men in the age band 60 - 64, particularly poor Black men in that age band are also a deeply disadvantaged group. The difference in circumstances between the similarly placed men and women is nothing as significant as the state makes out in its answering affidavits.

52. Moreover, the discrimination on grounds of age and gender in the present case is a form of discrimination that fundamentally impairs the human dignity of those who are victims of it. This is so for two reasons:

    52.1. First, there is its material effect which is undermining of human dignity. As we have seen above, the discriminatory provisions of the Act and Regulation condemn most of the class of means eligible men between 60 and 64 years old to abject poverty. To make most means eligible men in the 60 – 64 age band live in a household which spends less than R800 per month, in

[58] Brink v Kitzhoff 1996 (4) SA 197 (CC). President of the RSA v Hugo 1997 (4) SA 1 (CC). Fraser v The Children's Court 1997 (2) SA 261 (CC). Volks NO v Robinson 2005 (5) BCLR 446 (CC).

circumstances where they are dependent on others for income is profoundly subversive of their dignity.

52.2. Second, there is a symbolic effect which assails the dignity of the victims of the discrimination. The logic of denying able bodied men pensions until they are 65 years old is based on an historical assumption that if they are younger than 65, these men should be able to find employment. So if they are unable to provide for themselves and their families it is their own "fault" and not the responsibility of the State. The discrimination of the Act and the Regulation accordingly contains an implicit judgment on its victims which attacks their dignity and identity as men of a certain age. It communicates to poor 60 to 64 year old men, who are the victims of structural employment and who will never be able to work again, that they are somehow the authors of the misfortune visited on them and their families, that they are either lazy or prematurely aged and that strong and responsible men would not find themselves in such a position. This plainly undermines the human dignity of the men concerned.

53. Race discrimination is also a factor in considering the circumstances of the group of male "would be pensioners". The majority of the group of poor men seeking state support are Black and have suffered a lifetime of race

discrimination and resultant political, social and economic disadvantage. While the challenged provision does not directly discriminate against them on grounds of race, as we shall see below, the impact on them of its discriminatory effect is aggravated because it intersects with the effects of this group's sustained experience of race-based discrimination.

54. Another possible listed ground that is implicated in this case is the ground of social origin. While this ground has not been considered by our courts, it may be relevant in a discrimination claim by a group defining itself on the basis of its disadvantaged class position. Thus, the men in this case are also facing discrimination as poor people who have no private pension schemes or other income to support themselves and are thus in a worse position than people who have had access to better social and economic opportunities during their life times. Disadvantage associated with social origin or class position is not an accident of circumstance or the product of individual action but is generally the result of systemic inequality in access to education, job opportunities, health care and many other factors that decrease poor people's chances of ever changing their lot.

55. Even if social origin is not interpreted to cover a disadvantaged class position, it is submitted that poverty or disadvantaged class position should be treated as an analogous unlisted ground of discrimination for the purposes of section 9(3). In this regard, in the *August* case, the

Constitutional Court left open the question whether poverty should be treated as an analogous unlisted ground of discrimination.[59] However, it is significant that in enacting the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 to give effect to sections 9(3) to (5) of the Constitution, Parliament chose to add an additional listed ground of unfair discrimination on "socio-economic status" which is defined as including

> *"a social or economic condition or perceived condition of a person who is disadvantaged by poverty, low employment status or lack of or low-level educational qualifications"*

56. Parliament's decision to include this express ground of discrimination is consistent with the jurisprudence of the Constitutional Court on unlisted grounds of discrimination. Thus in *Khosa* the Court stated:

> *"In Hoffmann v South African Airways this Court held that 'at the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings, regardless of their position in society, must be accorded equal dignity'. To be considered an analogous ground of differentiation to those listed in s 9(3) the classification must, therefore, have an adverse effect on the dignity of the individual, or some other comparable effect."*[60]

Similarly, in recognizing an analogous unlisted ground of discrimination in *Mabaso* the Court stated

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[59] August and Another v Electoral Commission and Others 1999 (3) SA 1 (CC) at paras 12 and 36.

[60] Khosa v Minister of Social Development; Mahlaule v Minister of Social Development 2004 (6) SA 505 (CC) at para 70. See also Harksen v Lane NO 1998 (1) SA 300 (CC) at para 46. Larbi-Odam and Others v Member of the Executive Council for Education and Another 1998 (1) SA 745 (CC) paras 19 – 20 and Hoffmann v SAA 2001 (1) SA 1 (CC).

> *"This discrimination reinforces and perpetuates a pattern of disadvantage which exists between 'homeland' areas and the rest of South Africa. Accordingly, the discrimination has the potential to impair the fundamental human dignity of those adversely affected. Our Constitution expressly seeks to avoid the perpetuation of such patterns of disadvantage and the concomitant impairment of human dignity*"[61]

57. The ground of 'class' or 'poverty' is the basis on which groups of people suffer ongoing discrimination and its capacity to perpetuate patterns of disadvantage in society is obvious. Thus it is submitted that even if "class" and "poverty" are not embraced within the listed ground of "social origin" they should be recognized as analogous unlisted grounds.

Intersectional Grounds of Discrimination

58. Section 9(3) provides for the possibility of multiple listed and unlisted grounds arising in a single claim. Grounds may also overlap or 'intersect' leading to new forms of discrimination. In *NCGLE v Minister of Justice*, Sachs considered this in some detail. He said the following:

> *"One consequence of an approach based on context and impact would be the acknowledgment that grounds of unfair discrimination can intersect, so that the evaluation of discriminatory impact is done not according to one ground of discrimination or another, but on a combination of both, that is globally and contextually, not separately and abstractly. The objective is to determine in a qualitative rather than a quantitative way if the group concerned is subjected to scarring of a sufficiently serious nature as to merit*

[61] Mabaso v Law Soc, Northern Provinces 2005 (2) SA 117 (CC) at para 38.

> *constitutional intervention. Thus, black foreigners in South Africa might be subject to discrimination in a way that foreigners generally, and blacks as a rule, are not; it could in certain circumstances be a fatal combination. The same might possibly apply to unmarried mothers, or homosexual parents, where nuanced rather than categorical approaches would be appropriate. Alternatively, a context rather than category-based approach might suggest that overlapping vulnerability is capable of producing overlapping discrimination. A notorious example would be African widows, who historically have suffered discrimination as blacks, as Africans, as women, as African women, as widows and usually, as older people, intensified by the fact that they are frequently amongst the lowest paid workers."*[62]

59. Justice L'Heureux Dube of the Canadian Supreme Court has emphasized the particular effects of intersectional discrimination. In her judgment in *Canada (Attorney General) v. Mossop*, in a passage which was cited with approval by the Constitutional Court in the *National Coalition Home Affairs*[63] case, she addressed the issue of multiple grounds of discrimination as follows:

> *"…categories of discrimination may overlap, and…individuals may suffer historical exclusion on the basis of both race and gender, age and physical handicap, or some other combination. The situation of individuals who confront multiple grounds of disadvantage is particularly complex. Categorizing such discrimination as primarily racially oriented, or primarily gender-oriented, misconceives the reality of discrimination as it is experienced by individuals. Discrimination may be experienced on many grounds, and where this is the case, it is not really meaningful to assert that it is one or the other. It may be*

[62] National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others 1999 (1) SA 6 (CC) at para 113,

[63] National Coalition for Gay & Lesbian Equality v Minister of Home Affairs 2000 (2) SA 1 (CC) at para 40.

> *more realistic to recognize that both forms of discrimination may be present and intersect."* [64]

Similarly, in *Corbiere v. Canada*, she emphasized that equality analysis has to take account of the fact that denials of human dignity occur in, *"specific ways for specific groups of people, to recognize that person characteristics may overlap or intersect, and to reflect changing social phenomena or new or different forms of stereotyping*."[65]

60. In the present case, the applicants and their class of means eligible 60 to 64 year old men suffer intersectional discrimination in two different respects.

60.1. The first, is that they are victims of legislation which directly discriminates against them on grounds of their age and gender. As we have seen above, the intersectional discrimination on grounds of age and gender is particularly harmful because of the combined symbolic effect it has on the human dignity of the victims of the discrimination. The attack on the victim group's identity as men and as persons with dignity is one which would not be experienced in the same intensity if the discrimination was simply on the ground of gender or simply on the ground of age. It is the combination of

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[64] *Canada (Attorney General) v. Mossop*, [1993] 1 S.C.R. 554 at 645-646. See also "An Intersectional Approach to Discrimination" Ontario Human Rights Commission, Discussion Paper, October 9, 2001 which is available on the internet site of the Ontario Human Rights Commission at http://www.ohrc.on.ca/en/resources/discussion_consultation/DissIntersectionalityFtnts.

[65] *Corbiere v. Canada*, [1999] 2 S.C.R. 203 at 253.

these two grounds of discrimination which communicates to poor 60 to 64 year old men, that they are either lazy or prematurely aged and that strong and responsible men would not find themselves in their position.

60.2. The second respect in which the applicants and their class experience intersectional discrimination is indirect. As we have pointed out above, most of the members of the applicants' class are men who have experienced a lifetime of discrimination based on race and social origin or poverty. As a result, they have never had an opportunity to provide for their retirement, they find themselves in acute poverty and the discriminatory effects of the Act and the Regulation are experienced by them in an acute form.

The Fairness Enquiry

61. As discrimination takes place on the basis of specified grounds, the presumption in s 9(5) comes into operation and the respondents must show that such discrimination was not unfair.

62. The fairness enquiry as set out in *Harksen* looks at the following factors:

a) the position of the complainants in society, whether they have suffered from past patterns of disadvantage, and whether the discrimination is on a listed ground;

b) the nature of the provision or power and the purpose sought to be achieved by it. If it is aimed at achieving a worthy social goal and not at impairing the complainants it may be fair;

c) with due regard to (a) and (b) and other relevant factors, the extent to which the complainants' rights or interests have been affected, whether this has led to an impairment of their fundamental human dignity or constitutes an impairment of a comparably serious nature.

63. This is a contextual enquiry that focuses on the impact of the measure on the person or group complaining that it unfairly discriminates against them. The test allows for an examination of the purpose of the state's measure although arguably, this is a value based enquiry rather than the more justificatory approach that focuses on the state's financial or administrative

concerns which is followed in the s 36 limitations enquiry (following a finding of unfair discrimination).[66]

64. The fairness enquiry is focused on the complainant group rather than on the beneficiary group. However, it involves a weighing up of the needs of poor, elderly, men to a pension at age 60 and the harm suffered by their exclusion from the grant from age 60 to 64 as against the needs of poor, elderly women to promotional measures from the state.

65. In the case of *Pretoria City Council v Walker* 1998 (2) SA 363 (CC) the Constitutional Court found that a flat rate for municipal services in a township adjacent to a formerly white suburb that had to pay metered rates was not unfair race discrimination because the measure was aimed at addressing an historical inequality suffered by Black residents of urban areas. Similarly, in *President of the RSA v Hugo* 1997 (4) SA 1 (CC) the Court found that a presidential pardon of women with young children did not result in unfair discrimination for a male prisoner who was not pardoned.

66. However, the present case must be distinguished from both of these cases. Unlike the White residents in the *Walker* case, the complainants in this case are members of a disadvantaged group who have suffered from past patterns of disadvantage. While the differential pension age may be

[66] C Albertyn and B Goldblatt (2007) 'Equality' in S Woolman et al (eds) Constitutional Law of South Africa 2nd Edition, Chapter 35 at 78.

described as being aimed at achieving a worthy social goal, the impact on the men's dignity, equality and socio-economic rights is profound. On balance the measure cannot be said to be fair discrimination because of the severe impact it has on a very disadvantaged group.

67. The fairness enquiry, particularly part (c), looks at degrees of unfair discrimination. As O'Regan J indicated in *Hugo*,[67] '*the more invasive the nature of the discrimination upon the interests of the individuals affected by the discrimination, the more likely it will be held to be unfair*'.

68. While a substantive equality approach must be followed if we are to undo systemic disadvantage and build a society where all people are able to realize their human potential, we must be careful to craft positive measures that are not overly or unfairly invasive of the rights of others, particularly where such others themselves constitute disadvantaged groups. In the present case, the differential pension age is so harmful to the men left out of its ambit that it unfairly discriminates against them.

Limitations Clause

[67] President of the RSA v Hugo 1997 (4) SA 1 (CC) at para 112.

69. In the face of a finding of unfair discrimination, it remains open to the state to argue that the right involved can reasonable and justifiably be limited in terms of s 36 of the Constitution.

70. It is here that the respondents appears to direct their argument in respect of financial concerns. There are two answers to this argument. The first is factual. We have addressed in some detail above, the capacity of the State to absorb the cost of extending the old age pension to include means eligible men between 60 and 64 years old. A limitation argument based on this cost must fail. In a context where revenue overruns have averaged 4.9% for the 7 previous financial years, the State can never justify unfair discrimination which could be cured by an increase of only 1.9% on the social grants budget. The Constitutional Court dismissed a similar limitation argument in *Khosa* where the shortfall required was also less than 2% of then current cost of social grants.[68]

71. The second answer to a limitations case based on resources is more fundamental. It relates to the nature of equality violations. Resource limitations are rarely an answer to equality complaints because in most cases, inequality can be cured by moving downwards to spread available resources in a manner consistent with equality. Here the present case is to be distinguished from *Khosa* because in *Khosa* the applicant group of

[68] Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others 2004 (6) SA 505 (CC) at para 62.

permanent resident foreign citizens was extremely small relative to the comparator beneficiary group of South African citizens. Thus it was inconceivable that Parliament would decide to equalize downwards by removing pensions from South African citizens. The present case is, however, different. Here, the numbers of means eligible men and women in the 60 to 64 year age band are broadly similar. So if there genuinely was a resource constraint that prevents the extension of the pension to means eligible men in the 60 to 64 year age band, it would have been open to the State to meet the equality complaint by equalizing age eligibility somewhere between 60 and 65, or by providing a lower pension for all at age 60.

72. Thus even without the factual evidence which refutes the resource constraint argument, this argument could never be a basis for justifying the limitation of section 9. At best for the respondents, it would be relevant to questions of remedy.

Section 9(2)

73. There remains the question of section 9(2). It begins with the sentence:

> *'Equality includes the full and equal enjoyment of all rights and freedoms'.*

It then goes on to permit positive measures by stating that '

'To promote the achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination, may be taken'.

74. This first sentence is important in prefiguring a vision of the type of society that the positive measures are supposed to achieve. It indicates that the positive measures are not only remedial in the backward looking sense but are also aimed at ensuring that a future society based on all of the rights and freedoms is realized. The first sentence of s 9(2) accordingly links equality to the other rights including the socio-economic rights. For without realization of their material needs, people cannot equally participate in the political, social, cultural or economic life of the country.

75. The leading judgment on section 9(2) is the *Van Heerden* decision of the Constitutional Court.[69] Before analyzing the judgment of the Constitutional Court, it is important to emphasize three crucial distinctions between the present case and *Van Heerden*'s case.

75.1. The first concerns the nature of the complainant group. In the present case, the complainant group is a group whose members have faced sustained historical discrimination based on race and poverty, class or social origin and who are, for the most part, trapped in poverty. In *Van Heerden's* case, the complainant group was a group which had been the beneficiaries of historical privilege.

[69] Minister of Finance v Van Heerden 2004 (6) SA 121 (CC)

Indeed, in relation to pension benefits which was the specific issue giving rise to the dispute in *Van Heerden,* the complainant group remained an extraordinarily privileged group. As the Constitutional Court pointed out

> *"… the applicant and his class remain a privileged class of public pension beneficiaries notwithstanding the challenged remedial measures. Their pensions are indeed generous and several times more generous than they would, on their pensionable annual salaries, have been entitled to under comparable public sector pension funds. Moreover, they are considerably more generous than pensions payable out of the Special Pension Fund to people who had undergone sacrifices in order to bring about the new democratic order".*[70]

75.2. The second distinction is closely related to the first. The present case involves discriminatory access to a benefit which is protected by section 27(1)(c) of the Constitution. While *Van Heerden* also involved pensions, the applicants in *Van Heerden* were already in receipt of pensions that amply discharged any obligation the State may have owed to them under section 27(1)(c).

75.3. The final distinction concerns the nature of the scheme that was being challenged and the manner of its design. In *Van Heerden* the Court was concerned with a self-consciously designed, carefully calibrated affirmative action measure which was temporary in

[70] Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) at para 53.

duration. [71] In the present case we are dealing with a scheme, which if it is to be understood as an affirmative action scheme, does not appear to have been designed at all. The high watermark of the respondent's case is that they inherited a discriminatory scheme which had been designed for objectionable purposes in the 1930s and elected not to remove its discriminatory provisions because they thought that these may serve the interests of gender equality.

76. The latter difference between *Van Heerden* and the present case renders section 9(2) inapplicable to the present case. On its own terms, section 9(2) applies only to measures which are "*designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination."* In the present case, there is no evidence of such design whatsoever.

76.1. Thus the respondents have been unable to produce any policy documents which suggest that the retention of the age-based gender discrimination was the product of a considered decision, as opposed to an ex-post facto rationalization of a decision which was taken by inertia.

76.2. Moreover, in so far as a design is to be inferred from the Act and Regulations themselves, this is not a design that is even broadly

[71] Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) at paras 45 - 52.

tailored to the purpose which it is ostensibly aimed at achieving. As has been pointed out above, there is no rational basis for singling out poor women in the five year age band from 60 to 64 to advantage over poor men of comparable age but reverting to an approach of formal equality as soon as men and women reach the age of 65. If the promotion of the position of women was to be pursued rationally in a manner consistent with the State's obligations under section 27 of the Constitution, one would expect the pension eligible age of men and women to be the same, but women to receive a larger pension than men.

77. The Constitutional Court emphasized in *Van Heerden* that one must not require too high a level of precision in the design of a section 9(2) measure for fear of undermining the purpose of section 9(2).[72] However, there is a difference between subjecting self-consciously designed section 9(2) measures to a level of scrutiny that would inevitably defeat any affirmative action programme and insisting that the State show evidence of a considered "design" before it is entitled to invoke the protection of section 9(2). The Constitutional purpose of substantive equality is undermined if the State does not take properly considered affirmative action decisions which are designed to meet their purpose. Section 9(2) accordingly cannot be used as an ex post facto justification for passive decisions to retain pre-

[72] Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) at paras 41 – 43.

existing statutory schemes which may inadvertently benefit some victims of historical discrimination. The cause of affirmative action is demeaned if it becomes a legal excuse for the State not to act in circumstances where it lacks the political will or the energy to formulate a proper affirmative action scheme.

78. The present case concerns precisely such a situation. Instead of grappling with the complexities of an affirmative action scheme designed to balance the interests of means eligible women who have been the victims of lifelong discrimination on grounds of race, gender and poverty, and means eligible men who have been the victims of lifelong discrimination on grounds of race and poverty but have not experienced the added intersectional burden of gender discrimination, the State has found it convenient simply to keep in place the existing scheme that it inherited from the apartheid state.

79. The inherited scheme

79.1. was designed by the 1930s State for purposes wholly unrelated to gender equality,

79.2. benefits a small group of means eligible women in the 60 to 64 age band,

79.3. disproportionally prejudices the male counterparts of this group by leaving them in a position of abject poverty, when these men have a constitutional claim to social assistance and, as the victims of sustained historical intersectional discrimination on grounds of race and poverty, they are themselves entitled to expect affirmative action measures from the State, and

79.4. does not do anything to advance the position of women relative to men once they have reached the age of 65.

80. The inherited scheme is simply not the sort of scheme that section 9(2) was designed to protect. So the Act and regulations cannot be shielded from unconstitutionality by section 9(2). It simply does not apply to inherited schemes which have not been designed as affirmative action measures.

81. In the alternative, and in the event that , this Court holds that the Act and Regulation are capable of falling within the ambit of section 9(2), it is submitted that they fail to pass the test set out in *Van Heerden* for a measure to be saved by section 9(2). In *Van Heerden* the Court identified three criteria that must be satisfied for a defence to succeed under s 9(2):

81.1. Does the measure target persons or categories of persons who have been disadvantaged by unfair discrimination?

81.2. Is the measure designed to protect persons or categories of persons who have been disadvantaged by unfair discrimination

81.3. Does the measure promote the achievement of equality? [73]

82. We do not dispute that the Act and the Regulation pass the first stage of the *Van Heerden* test. To the extent that it can be said to "target" any group, the age-based gender discrimination targets a group (means eligible women) who have been the victims of past discrimination. However, it is on the second and third stages of the *Van Heerden* test that the Act and Regulation fail.

83. We have already commented on the absence of "design" in the Act and Regulation. This is sufficient to disqualify them on the second stage of the *Van Heerden* test.

84. In respect of the third stage, the Constitutional Court indicated in *Van Heerden* that a section 9(2) scheme may adversely affect previously advantaged groups. It emphasized however that

> '*A measure should not constitute an abuse of power or impose such substantial and undue harm on those excluded from its*

[73] Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) at para 37.

benefits that our long-term constitutional goal would be threatened'.[74]

There must accordingly be a contextual enquiry to balance of the interests of the group for whom the measure is designed to benefit and the group that suffers from their exclusion from the measure because of their advantage. It is at this stage that the respondent's section 9(2) case clearly fails. The group excluded from the early pension eligibility can hardly be described as advantaged. The harm they suffer is not incidental and the price of such exclusion is overly onerous. The Act and the Regulation cannot be protected by section 9(2) because the discriminatory scheme they establish does not promote equality, it compounds the effects of historical discrimination and inequality.

Conclusion

85. It follows that the Act and Regulation are inconsistent with section 9(3), are not saved by section 9(2) and are accordingly unconstitutional and invalid.

REMEDY

86. Section 172(1) of the Cosntitution states the following:

[74] Minister of Finance v Van Heerden 2004 (6) SA 121 (CC) at para 44.

"(1) When deciding a constitutional matter within its power, a court-

(a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and

(b) may make any order that is just and equitable, including-

(i) an order limiting the retrospective effect of the declaration of invalidity; and

(ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

The Act and the Regulation are inconsistent with sections 9 and 27 of the Constitution. In terms of section 172(1)(a) of the Constitution, this Court is accordingly obliged to declare the Act and the Regulations to be unconstitutional and invalid. There remains, however, a debate over how this Court should exercise its equitable remedial jurisdiction under section 172(1)9b) to implement and regulate its primary order of constitutional invalidity.

87. It is a central principle of the remedial jurisprudence of the Constitutional Court that an order in terms of section 172 should, wherever possible, provide the successful litigant with meaningful relief.[75] Given the duration of the litigation in the present case and the ages of the individual

[75] S v Bhulwana; S v Gwadiso 1996 (1) SA 388 (CC) at para 32. Zondi v MEC for Traditional and Local Government Affairs and Others 2005 (3) SA 589 (CC) at paras 130 – 131. Dawood and Another v Minister of Home Affairs and Others 2000 (3) SA 936 (CC) at paras 62 – 68. National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs and Others 2000 (2) SA 1 (CC) at paras 65 and 82

respondents, they will not obtain any relief from the present application unless an order of invalidity is made with some retrospective effect because, by the time that any order of invalidity is confirmed by the Constitutional Court, they will all have turned 65 and be drawing pensions under the Act and Regulation in their present form.

88. The question of retrospective relief raises budgetary concerns which are for the applicant and respondent to canvass with this Court. The amicus does not involve itself in this debate.

89. However the amicus does take issue with the contention of the respondents that if the Act and Regulation are struck down, any order of invalidity should be suspended.[76]

90. The financial issues have been canvassed extensively above. For present purposes it suffices to point out that there is no budgetary reason to delay immediate prospective implementation of an order of constitutional invalidity.

91. The suspension order sought by the respondents would result in the ongoing denial of constitutional rights to those most in need of the protection of the Constitution and would be inconsistent with the approach

[76] Pakade vol 1 p 173 para 158.2.

adopted by the Constitutional Court in *Khosa* where a similar contention of the State was rejected in the following terms:

> *"Suspending the declaration of invalidity would, in my view, not constitute a 'just and equitable order' as contemplated by s 172(1)(b) of the Constitution. There is every reason not to delay payment of social grants any further to the applicants and those similarly situated."*[77]

92. It follows that the appropriate order would be an order "rewriting"[78] the definitions in the Act and Regulation so that the 65 year age limit for men and 60 year limit for women was replaced with a 60 year limit for everyone.

MATTHEW CHASKALSON

Chambers
Johannesburg
10 August 2007

[77] Khosa and Others v Minister of Social Development and Others; Mahlaule and Another v Minister of Social Development and Others 2004 (6) SA 505 (CC) at para 88.

[78] On the permissibility of such an order see Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another 2005 (1) SA 580 (CC) at paras 124 – 125 and paragraph 7 of the order.